No. 89-442

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IN THE

Supreme Court of the United States
OCTOBER TERM, 1988

ALEXIA ANDERSON, *et al.*,

Petitioners,

v.

AETNA CASUALTY AND SURETY COMPANY, et al.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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QUESTIONS PRESENTED*

1. May a federal district court certify a nationwide, mandatory, non-opt out class under Rule 23(b)(1) of the Federal Rules of Civil Procedure, consisting of approximately 195,000 tort victims who have individual claims for damages against a financially responsible defendant?

2. If Rule 23(b)(1) permits such certification, is the certification nonetheless invalid under *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985), because those victims who object to having their claims for damages adjudicated on a classwide basis, in a district with which they have no connection whatsoever, by counsel not of their own choosing, with no opportunity to opt out, would be deprived of a property right without due process of law?

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*In addition to the named petitioner Alexia Anderson, the other petitioners include the other 528 individuals who are listed at the conclusion to the opinion of the court of appeals, Pet. App. 92a—132a, with a bold line along side their names, all of whom were appellants in that court. In addition to the respondent Aetna Casualty and Surety Company, which was the sole defendant in the district court, Glenda Breland, Sherry Gaskins, Helen Quinn, Maria Martinez, Cheryl Zuniga, Gayle Ayon, and Judith Deptula were plaintiffs and class representatives in the district court, and they and Aetna were appellees in the court of appeals. Although the opinion in the court of appeals is captioned "In Re A.H. Robins Company, Incorporated," Robins was not a party in either the district court or court of appeals and is, therefore, not a respondent in this Court. Because its attorneys entered an appearence in the court of appeals, as did the attorneys for the law firm McGuire, Woods, Battle, & Boothe, copies of this petition and the appendix are being served on those attorneys.

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit is reported at 880 F.2d 709 and appears in the separately bound appendix at 1a-91a. The decision of the United States District Court for the Eastern District of Virginia conditionally granting class certification is not reported and appears at 134a-135a. The district court's memorandum of April 12, 1988, approving class certification, is reported at 85 B.R. 373 and appears in the appendix at 138a-157a. The unreported order of that date granting class certification appears at 136a-137a. The memorandum of the district court dated July 26, 1988, approving the class action settlement, is reported at 88 B.R. 755 and is set forth at 160a-177a. The unreported order entered pursuant to that memorandum is set forth at 178a-180a.

JURISDICTION

The judgment of the court of appeals was entered on June 16, 1989. 181a-183a. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION AND RULE AT ISSUE

The Due Process Clause of the Fifth Amendment to the Constitution provides in pertinent part that "No person shall . . . be deprived of . . . property, without due process of law."

Rule 23 of the Federal Rules of Civil Procedure provides in pertinent part as follows:

> (b) **Class Actions Maintainable.** An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:
>
> > (1) the prosecution of separate actions by or against individual members of the class would create a risk of
> >
> > > (A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or
> >
> > > (B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests; or
> >
> > * * * *
> >
> > (3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual

members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.

STATEMENT OF THE CASE

The principal question presented on this petition is whether the district court properly certified a mandatory, nationwide class under Rule 23(b)(1) of the Federal Rules of Civil Procedure, consisting of all Dalkon Shield victims who filed timely claims in the A.H. Robins Company Inc. ("Robins") reorganization proceeding, without providing those victims the right to opt out. If the answer to that question is yes, then the Court must consider whether that certification order violates the due process rights of unnamed class members. In the court of appeals petitioners also challenged the validity of the district court's approval of the settlement of this class action, but in this Court they seek only to overturn the rulings precluding them from opting out and proceeding on their own against the respondent Aetna Casualty and Surety Company ("Aetna"), which is the sole defendant in this action. In order to explain the rulings below, it is first necessary to describe the background of this case, including the prior litigation against Robins.[1]

[1]The district court actually certified two classes, one for those who filed timely claims in the Robins reorganization proceeding and the other for those who did not. Since the vast majority of petitioners filed on time, this petition will not discuss the validity of those provisions relating to those who were not timely. In addition, the class certification affected not only United States residents, but those claimants who reside in the more than

(footnote continued)

1. *Facts*

Beginning in 1970, the A.H. Robins Company, a Richmond Virginia corporation which is not a party to this litigation, began selling the Dalkon Shield intrauterine contraceptive device, and, almost immediately, adverse reactions and serious injuries developed. Robins continued to market the product in the United States until June 1974, but it did not recall the devices still in use until the fall of 1984. Respondent Aetna was Robins' product liability insurer for the Dalkon Shield throughout this period, and it provided for the costs of defense and the payment of judgments and settlements in accordance with the terms of its insurance policy.

In February 1975, a Kansas state court jury awarded a Dalkon Shield plaintiff $85,000 against Robins, including $75,000 in punitive damages. Thereafter, suits were filed in increasing numbers, and verdicts were rendered, generally in favor of the plaintiffs, with a significant number providing for substantial compensatory and punitive damages. As a result, in August 1985, with approximately 6,000 Dalkon Shield cases then pending, Robins sought protection under Chapter 11 of the Bankruptcy Code, thereby obtaining an automatic stay of all litigation against it.

In the meantime, suits had been filed against Aetna alleging that it, too, was responsible for the damages to Dalkon Shield victims. None of those cases went to trial, but a number were dismissed on various grounds, including failure to state a claim because the courts found that Aetna, as an insurer, had no affirmative duty to warn the public or to facilitate a recall of a product for which it was providing insurance.

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100 foreign countries in which the Dalkon Shield was sold. Although some of the petitioners are not U.S. residents, and although the worldwide nature of the class certification magnifies the due process difficulties in the certification order, that feature also will not be discussed further because petitioners believe that the creation of a nationwide class presents such insurmountable barriers that, even on that basis, the decision below cannot be sustained.

This case was filed by the respondent Glenda Breland and the other six individual respondents in the United States District Court for the District of Minnesota on April 9, 1986. The complaint alleged subject matter jurisdiction based on diversity of citizenship under 28 U.S.C. § 1332, and several other statutes. None of the seven plaintiffs was a Minnesota resident, although their counsel were located there. Aetna was not a Minnesota corporation or headquartered there, and two of the three other individuals who were named as defendants in the original complaint, but later dismissed by plaintiffs — E. Claiborne Robins, and E. Claiborne Robins, Jr., — were citizens of Virginia, where Robins manufactured the Dalkon Shield and from which it directed the defense of the litigation against it.[2] The Minnesota District Court *sua sponte* transferred the case to the Eastern District of Virginia on April 28, 1986, where the Robins bankruptcy proceeding was being conducted. On September 23, 1986, the Breland plaintiffs filed a third amended complaint, naming only Aetna as a defendant, but listing the other original defendants as co-conspirators. This document then became the operative pleading for class certification and settlement purposes.

Under a variety of labels, the Breland plaintiffs alleged that Aetna was jointly liable with Robins and other coconspirators for all the injuries suffered by all Dalkon Shield victims, generally under a theory of joint enterprise or conspiracy, in which Aetna was alleged to have participated since the first device was sold. Despite these broad allegations of joint responsibility, the complaint identified certain events that suggested that Aetna's liability was not constant throughout the years 1970-1984, but increased over time. In particular, the complaint alleged that, after the February 1975 punitive damages verdict in Kansas, Aetna intensified its involvement in the defense of the Dalkon Shield litigation, and that effective March 1, 1978, an agreement was entered into between Robins and Aetna that further altered the insurance relationship and made the parties essentially equally responsible for Robins' continuing failure to recall the remaining devices still in use.

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[2]The third alleged co-conspirator, Hugh Davis, was a citizen of Maryland.

At various places the amended complaint also alleged a cover-up by Robins, Aetna, and other co-conspirators involving the destruction of documents, perjury, and obstruction of justice. The principal thrust of those allegations was that the conspiracy injured the victims in their efforts to recover on their claims against Robins. In addition, the Breland plaintiffs alleged that these illegal acts resulted in required reports not being sent to the Food and Drug Administration which, in turn, would have led to public notice and recall of the Dalkon Shield, which would have prevented injuries to at least some Dalkon Shield victims.

The amended complaint implicitly recognized that more was required to recover against Aetna than proving that it was Robins' insurance carrier during the relevant period. Therefore, plaintiffs' theories of joint enterprise and conspiracy involved not simply a failure to warn, but affirmative acts of wrongdoing. However, according to the amended complaint, such acts did not begin until February 1975 (or perhaps as late as March 1978), and hence under those theories the 50% of the Dalkon Shield users who had their Shields removed prior to January 1, 1975, could not show the requisite causal connection between their injuries and the tortious conduct of Aetna that would entitle them to recover. Despite the potential for different results for different groups of women, depending on when they had their Shields removed, the complaint sought relief from Aetna in the form of compensatory and exemplary damages for *all* Dalkon Shield victims.[3]

The Breland complaint asked the court to certify a mandatory nationwide class, consisting of all Dalkon Shield victims who had filed a timely claim in the Robins' bankruptcy proceeding. Although the complaint contained allegations that there was a "predominance" of common issues of law and fact and that a class action was a

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[3]Count VIII of the complaint alleged that a settlement agreement between Aetna and Robins regarding the amount of insurance coverage that was owed by Aetna was collusive and should be set aside. Since petitioners raised no issue concerning that aspect of the complaint and its eventual resolution, it will not be mentioned further in this petition.

"superior" method of resolving this dispute — two factors required for certification under Rule 23(b)(3) of the Federal Rules of Civil Procedure — certification was sought only under paragraphs (A) and (B) of Rule 23(b)(1). The principal differences between subsections (1) and (3) are that the former does not require notice to class members upon certification, and it gives class members no right to opt out. According to the complaint, certification under paragraph (A) of subsection (1), which applies only when adjudications "would establish incompatible standards of conduct for the party opposing the class," was met because judgments "could result in inconsistent definitions of the legality of Aetna's conduct . . . ." The Breland plaintiffs also asserted that the requirements of paragraph (B), which applies to adjudications that "would as a practical matter be dispositive of the interests of other members not parties to the adjudications or substantially impair or impede their ability to protect their interests," were satisfied. In their view, that test was met because early decisions would "as a matter of law foreclos[e] as a practical matter the arguments of subsequent plaintiffs" even though subsequent courts, in the same or other jurisdictions, would be legally free to reach different conclusions on the basic issue of whether Aetna was liable for its conduct to Dalkon Shield victims.

Petitioners are more than 500 Dalkon Shield victims and family members who have sought to maintain their own actions against Aetna because they believed both that the Robins bankruptcy might not produce sufficient funds to pay their claims in full and that the purported class action did not provide them with the best vehicle for a complete recovery against Aetna. In petitioners' view, Aetna was liable for their injuries because Aetna (a) assumed from Robins in 1975 the responsibility to monitor the performance of the Dalkon Shield and to decide whether or not to recall the product; (b) concealed the fact that Robins and its agents had engaged in the destruction of evidence in 1975; and (c) concealed the negative results of at least eight scientific studies which it had commissioned on the safety and efficacy of the Dalkon Shield.

From early on in this litigation, and continuing until its resolution by the district court, petitioners objected to their inclusion in this

case in a variety of different ways. Some sought permission to file their own lawsuits against Aetna alone in the United States District Courts for the Districts of Kansas and New Hampshire.[4] Robins and Aetna opposed the motions to lift the bankruptcy stay, and the district court agreed with them on the ground that, if the Breland case was certified as a class action, those seeking to file separate lawsuits might be members of that class.

Some of the petitioners challenged that decision, but the court of appeals affirmed. *See In Re A.H. Robins Co. (Oberg), supra*, note 4. In a foreshadowing of the issues presented in this petition, the court noted that the district court had by that time conditionally certified this case as a class action, but had not yet afforded petitioners an opportunity to opt out and pursue their own claims against Aetna. It went on to observe, however, that this Court had held in *Phillips Petroleum Company v. Shutts*, 472 U.S. 797, 812 (1985), that "'due process requires at a minimum that an absent plaintiff be provided with an opportunity to remove himself from the class by executing and returning an "opt out" or "request for exclusion" form to the Court.'" 828 F.2d at 1027. The court then held that the assertion that the Breland action did not adequately protect petitioners' interests was "premature" and should only be resolved if petitioners were denied the opportunity to opt out.

In the meantime, respondent Aetna had decided not to resist certification in this case, but embraced it as an opportunity to resolve all claims that might be filed against it in a single lawsuit. Since several hundred thousand women had filed claims against Robins, presumably there would be a similar number of Aetna claimants. Therefore, in order to avoid a multiplicity of trials and to have all the disputes resolved in a forum that appeared to be favorable to Aetna's position, Aetna offered that, if it were found liable on the common ques-

[4]Permission was required because of prior rulings extending the bankruptcy stay against litigation to *all* Dalkon Shield claims, whether or not Robins was included as a defendant. *See A.H. Robins Co. v. Piccinin*, 788 F.2d 944 (4th Cir.), *cert. denied*, 479 U.S. 876 (1986); *In Re A.H. Robins Co. (Oberg)*, 828 F.2d 1023 (4th Cir. 1987), *cert. denied*, 108 S.Ct 1246 (1988).

tion applicable to all cases, it would agree to be bound by the determinations of causation and the amount of damages that would be assessed in the process of resolving the individual claims against Robins in the bankruptcy proceeding. 146a. However, Aetna did not agree to pay the full amount of all claimants' compensatory damages if the funds from the Robins reorganization were insufficient, nor did it agree to pay punitive damages, for which it surely would have been liable if the allegations of criminal conduct against it were proven. Based on Aetna's representations and the amended complaint, and over the objections of some of these petitioners, the district judge, who was also handling the Robins' bankruptcy, certified a conditional mandatory class action in a brief order entered on December 29, 1986. 134a-135a. That order did not describe the class or state what part of Rule 23(b) governed, let alone explain the basis for certification of a mandatory class. Moreover, no notice to the class was provided, and no opt out was made available.

While this case was proceeding only against Aetna, Robins entered into a merger agreement with American Home Products Corporation ("AHP"), which became the central element in its Chapter 11 reorganization plan. To dispose of the Dalkon Shield claims, the plan established a separate Claims Resolution Facility, and it created a Claimants Trust that would be the exclusive source of funding for all Dalkon Shield victims. While the amount to be deposited in that Trust was quite substantial, petitioners believed that it was insufficient to pay all Dalkon Shield claims in full, and everyone — including Robins, Aetna, and the district court — recognized that possibility.

Robins was fully aware of this litigation and of the possibility of other cases being brought on similar theories. Therefore, Robins, in conjunction with Aetna, sought a means to end all litigation, except those cases proceeding under the plan against the Trust. To achieve that end, two additional steps were taken by Robins in conjunction with Aetna.

First, Aetna and the Breland plaintiffs entered into a class wide settlement, under which Aetna would make a cash contribution to

the Claimants Trust and provide some additional insurance if the Trust fund were insufficient. The size of Aetna's contribution is not at issue here. However, the fact that it is a limited one, which does not assure payment in full for all claimants, explains why petitioners have continuously sought to opt out of this class and to proceed independently against Aetna.

Despite the professed desire of Robins to have the litigation against Aetna finally concluded, the reorganization plan does *not* require that the settlement in this case (referred to in the plan and here as *Breland*) be upheld in order for the plan to be effective. Instead, the only requirement was that the district court approve the *Breland* settlement. Thus, if this Court grants this petition and sets aside the mandatory class action ruling, the plan may nonetheless still go into effect. In that case, under section 6.06(b) of the reorganization plan, Aetna would still be required to provide $100 million in insurance for the Dalkon Shield claimants, but it would not be required to make cash contributions or provide the other insurance agreed to as part of the *Breland* settlement.

Second, the plan also contained a provision enjoining all suits by Dalkon Shield victims against third parties (other than doctors, hospitals, and other health care providers) on any Dalkon Shield related claim, including those against the alleged co-conspirators described in the *Breland* complaint. The injunction did not apply to suits against Aetna, which were treated separately, but unlike the *Breland* settlement, final approval of the injunction was specifically made a condition precedent to the consummation of the Robins and AHP merger and the implementation of the Robins reorganization plan. Under that injunction, which is being challenged in this Court in another petition being filed simultaneously with this one, *Rosemary Menard-Sanford v. A.H. Robins Company, Inc.*, all of the co-conspirators mentioned in the *Breland* complaint, as well as various lawyers and law firms and other individuals referred to, but not named, in the complaint and other papers, would be released from all liability — even for civil damages resulting from their criminal conduct — without Dalkon Shield victims ever having their day in court against them.

After tentative settlements of both the Chapter 11 proceeding and this case were reached, the district court returned to the class certification question and made its conditional certification order of December 1986 final, in an order entered on April 12, 1988. 136a-137a. Although the order did not specify the portion of Rule 23 on which it was based, it is plain from the accompanying memorandum that the court certified a mandatory class under Rule 23(b)(1)(A) on the theory that the resolution of the basic liability issue should be decided in one forum in order to prevent "incompatible standards and conflicting decisions" (153a), *i.e.*, Aetna winning some cases and losing others. The court asserted that allowing an opt out would destroy the effectiveness of this ruling and that Aetna's concession on the disposition of individual claims through the Claims Resolution Facility eliminated any other problems posed by mandatory class certification. 153a-154a. After giving notice to the class, the district court held a fairness hearing and approved the settlement, over petitioners' strenuous objections, as to both the absence of an opt out and the adequacy of the settlement. 160a-177a.

2. *Opinion of the Court of Appeals*

The court of appeals affirmed. In a lengthy opinion, the court first addressed the background of both the lawsuits directed against Robins and the litigation aimed at Aetna. Then the court turned to an overview of past class actions in the context of mass tort litigation, including a detailed discussion of how the courts and commentators have viewed Rule 23 from 1966, when major changes were made in the Rule, to the present. The court's analysis of the merits of the case, which started on page 77 (66a), began with the court's announcement that the "overriding fact" that lies at the core of its disposition of the appeal is the "uniqueness" of this case because of the hundreds of thousands of claimants. *Id.*

The court next observed that the role of Aetna as an active participant "goes to the very heart" of the case and "overhangs other issues" (68a). Since Aetna's liability had to be established for the plaintiffs to prevail, the court concluded that it is "very much in

the interests of both Aetna and Dalkon Shield claimants" to have the question resolved through a class action (68a). That would be true for victims, of course, only if the named plaintiffs actually prevailed in this litigation. The court then stated that the liability determination would not depend on facts relating to individual victims, *id.*, which would be true only if the plaintiffs relied on the theory, which petitioners have consistently downplayed, that there was a joint enterprise from the start. However, if petitioners' alternative approach were pursued, Aetna's liability would increase over time as it became more involved in the decision-making concerning the recall, the coverup, and the other criminal activity. Under that approach, the time period during which each woman wore the Shield would be critical.[5]

The court then asserted that, absent certification of a mandatory class, the question of Aetna's role would have to be resolved in every case, with the resulting risk of inconsistent verdicts that the court claimed would produce a "chaotic situation" that would be "intolerable" (69a). The court then returned (70a-74a) to Aetna's promise to submit all individual disputes on causation and the amount of damages to Robins' Chapter 11 Claims Resolution Facility and to Aetna's agreement to make a payment to the Claimants Trust. According to the court, that promise would enable all of the cases to be resolved with what the court said was "fairness to all" (70a), which is true only if the risk of inadequate funding is overlooked, as the court did.

Next, the court addressed petitioners' due process argument, which was based on the absence of an opt out provision as required by *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985). 74a. The court responded by asserting that, in effect, there was an opt out, since each claimant had a right to an individual settlement or a jury trial of her damages claim against the Claims Resolution Facility.

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[5]The court's first mention of destruction of documents and other criminal activity is on page 105 of its 107-page opinion. 89a. A more complete statement of the basis for the claimed criminal activity of Robins and its co-conspirators is contained in the *Menard-Sanford* petition at 14-15.

That response completely overlooked the desires of many claimants, including petitioners, to litigate the principal issue concerning the liability of Aetna (and other co-conspirators) for compensatory and punitive damages in a place other than Richmond, where Robins is headquartered and where the district court has already stated that it believes that the case against Aetna is a weak one. 174a-176a. And it disregards their desire to be represented by counsel that they, not Glenda Breland, have chosen.

The court then attempted to distinguish all prior circuit court opinions on the propriety of class actions in mass tort cases, none of which had upheld a mandatory, non-opt out class under Rule 23(b)(1). First, it referred to the decision in *McDonnell Douglas Corp. v. United States District Court for the Central District of California*, 523 F.2d 1083 (9th Cir. 1975), *cert. denied*, 425 U.S. 911 (1976), as "outdated" (78a). Then it cited two asbestos cases, *School Asbestos Litigation*, 789 F.2d 996 (3d Cir.), *cert. denied*, 479 U.S. 852 (1986), and *Jenkins v. Raymark Industries, Inc.*, 782 F.2d 468 (5th Cir. 1986), and the reluctant upholding of class certification in order to sustain the settlement in *In Re Agent Orange*, 818 F.2d 145, 166 (2d Cir. 1987), *cert. denied*, 108 S. Ct. 695 (1988), to refute petitioners' claim that no court of appeals had ever sustained a mass tort class certification. *Id.* But the Fourth Circuit failed to acknowledge at that point the critical distinction between those cases and this one — the classes there were certified under Rule 23(b)(3), which gave every claimant the right to opt out. When the court finally acknowledged that distinction (82a), it again asserted that the victims had "in practice, though not in express language," the functional equivalent of an opt out here because of their right to litigate their individual claims under the Claims Resolution Facility. *Id.*

In an effort to assure victims that they would be paid in full, the court proclaimed that the Claimants Trust "will be sufficient" to assure "full payment" for all victims who had filed timely claims (84a). Then, overlooking the entire rationale for this case and the reasons for petitioners' objections to the Robins reorganization plan, as well as the admission in Robins' disclosure statement that the Claimants Trust may be inadequate to pay all claimants in full, the

court erroneously asserted that "[n]either the appellants nor anyone else has asserted that the fund is insufficient." *Id.*

Compounding its misunderstanding, the court next announced that the reorganization plan and this case are "interdependent" so that "[f]ailure of approval of either the Plan of Reorganization or the *Breland* settlement would derail hopelessly the carefully negotiated and crafted Plan and Settlement leaving the Dalkon Shield claimants to the vagaries, expenses, and delay of further litigation." 85a. Like its erroneous claim about full funding, this assertion is demonstrably wrong since the plan required only the district court, and not the court of appeals or this Court, to approve the *Breland* settlement in order for the plan to be consummated. Since that condition has been met, even if the certification ruling had been overturned by the court of appeals, or is set aside by this Court, the reorganization plan may still go forward.[6]

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[6]The plan does not state this proposition itself in so many words, but it can be derived from two sources. First, under section 6.06(b) of the plan, Aetna is obligated to make payments to the Claimants Trust even if there is no final order approving the *Breland* settlement, if the merger with AHP is otherwise ready to be consummated. Second, section 7.02(b) of the plan requires that all of the conditions of the merger agreement be satisfied. One of those conditions is contained in section 7.1(g), which requires that "the Court [defined in section 1.34 of the plan to be the U.S. Bankruptcy and/or District Courts for Eastern District of Virginia] shall have entered an order approving a Qualified Breland Settlement, ***whether or not such order shall have been reversed or stayed pending appeal***" (emphasis added).

REASONS FOR GRANTING THE WRIT

A. The Class Certification Ruling Is In Conflict With Every Court of Appeals That Has Considered This Or Similar Issues and Represents Such a Marked Departure From Accepted Practice That It Warrants Review By This Court.

The court of appeals upheld a mandatory, nationwide class under Rule 23(b)(1) for personal injury tort claims by approximately 195,000 Dalkon Shield victims, despite the fact that petitioners and others had substantial disputes over the management of the putative class and over whether the proposed settlement should be accepted. No victim who filed a timely claim in the Robins reorganization was given the right to opt out of the settlement with Aetna, as they would have had under a class certified under Rule 23(b)(3). As a result, those victims will never be able to sue Aetna on the issue of its civil liability to victims for its role in an alleged criminal conspiracy. While each victim can have her day in court against the Claimants Trust established under the reorganization plan, she is foreclosed from suing Aetna if that Trust is not sufficient to pay her claim in full. The question whether Rule 23 allows a mandatory class action in these circumstances requires this Court's consideration.

The sole reason given by the court of appeals for sustaining the class here is that there is one central issue governing each victim's case, and that, without a mandatory class, there might be inconsistent results on this issue. But even if the "central issue" theory applied here — which it does not — it has been rejected by every court of appeals that has considered it as a basis for mandatory certification under Rule 23(b)(1). *See, e.g., McDonnell Douglas Corp. v. United States District Court for Central District of California*, 523 F.2d 1083, 1086 (9th Cir. 1975); *In Re Federal Skywalk Cases*, 680 F.2d 1175 (8th Cir.), *cert. denied*, 459 U.S. 988 (1982); *In Re Bendectin Products Liability Litigation*, 749 F.2d 300, 305 (6th Cir.

1984); *School Asbestos Litigation*, 789 F.2d 996, 1002 (3rd Cir. 1986); *In Re Temple*, 851 F.2d 1269, 1272 (11th Cir. 1988).[7]

While a few decisions have upheld mandatory class actions under Rule 23(b)(1) where damages were involved, they have done so only where injunctive relief was essential to remedy the violations alleged in the complaint or to establish uniform conditions governing future relations between the parties. *See, e.g., Robertson v. National Basketball Ass'n*, 556 F.2d 682, 685 (2nd Cir. 1977), and *Reynolds v. National Football League*, 584 F.2d 280, 284 (8th Cir. 1978). This line of cases is inapplicable here because no injunction was ever sought against Aetna, nor would an injunction offer relief to Dalkon Shield victims, whose injuries can be remedied, if at all, only by money damages.

Some courts have held out the possibility of certification under Rule 23(b)(1)(B) where a limited fund is available (especially for punitive damages). *See, e.g., In the Northern Dist. of Calif., Dalkon Shield IUD Products Liability Litigation*, 693 F.2d 847, 851-852 (9th Cir. 1982), *cert. denied*, 459 U.S. 1171 (1983); *In Re Bendectin Products Liability Litigation, supra*, 749 F.2d at 305, but no court of appeals has ever allowed mandatory certification on that basis. Moreover, in this case, no party has claimed that Aetna has a limited fund for distribution. While Aetna's insurance policy with Robins had a limitation, that fact is irrelevant to this case since the relief sought would come from the general assets of Aetna, as a principal and alleged wrongdoer, not from its contractual liability to provide insurance to Robins.

Until the decision below, every federal appeals court that had considered a mandatory class of any kind under Rule 23(b)(1) had rejected it. *See In Re Temple, supra*, 851 F.2d at 1271, 1272 (requir-

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[7]Nor do petitioners acquiesce in the court of appeals' erroneous assumption that the "central issue" of Aetna's liability is common to all victims. Under the theories of liability pressed by petitioners, but given little attention by the Breland plaintiffs and their counsel, Aetna could be found liable to some victims, but not to others, even by one fact-finder in a single proceeding.

ing review of certification of mass tort claims under (b)(1) with "utmost scrutiny" and finding any such certification to be "highly suspect"). Therefore, the acceptance of this novel theory by the Fourth Circuit creates a direct conflict among the circuits on an important issue of federal procedure that this Court ought to resolve.

Indeed, even when certification of mass tort actions has been sought under Rule 23(b)(3), which explicitly requires an opportunity to opt out, the courts have been extremely reluctant to approve it. Thus, the court in *In Re Agent Orange*, 818 F.2d 145, 165-67 (2d Cir. 1987), *cert. denied*, 108 S.Ct. 695 (1988), upheld certification under Rule 23(b)(3), principally because plaintiffs' evidence of causation was so weak and the military contractor defense was so strong. Moreover, the Second Circuit's willingness to approve certification in that case was also heavily influenced by the fact that there had been a settlement of all of the claims and summary judgment had been granted against all those who had opted out. *Id.*; *see also In Re Beef Industry Antitrust Litigation*, 607 F.2d 167, 174-75 (5th Cir. 1979), *cert. denied*, 452 U.S. 905 (1981) (approving class certification for purposes of settling with one defendant, only because of "genuine option" of class members to opt out).

The court of appeals here did not decide whether it could have sustained certification under Rule 23(b)(3) (82a), but if it had, it would have had to allow petitioners to opt out, which the settlement and the district court certification order did not permit. Again, the reluctance of the courts to approve mass tort class action certifications under Rule 23(b)(3), even with its opt out protection, underscores the deviation by the district court from accepted standards in certifying this case under Rule 23(b)(1), and by the court of appeals in affirming the certification order. Moreover, if sustained, this approach to class certification in tort cases would allow for wholesale evasion of not only the opt out requirements in Rule 23(b)(3), but also of Rule 23's other protections, including the requirements of Rule 23(c)(2) of the best practicable notice (to be paid for by the plaintiffs), and the explicit right of class members to intervene or otherwise participate.

The rationale adopted by the court of appeals would also have far reaching impacts that further support review by this Court. According to the Fourth Circuit, because there is a central question as to the liability of Aetna that is common to all victims, it is in the best interest of everyone to have that question resolved in a single forum. That justification would, of course, apply to most mass tort cases and to all class certifications sought under all sub-parts of Rule 23 and would thereby obliterate the carefully constructed differences between them. *See McDonnell Douglas, supra*, 523 F.2d at 1086 (expansive interpretation of Rule 23(b)(1) would render Rule 23(b)(3) "superfluous"); *In Re Dennis Greenman Securities Litigation*, 829 F.2d 1539, 1545 (11th Cir. 1987) (broad interpretation of Rule 23(b)(1)(A) would make "other sub-sections of Rule 23 meaningless, particularly Rule 23(b)(3)"). Whatever the theoretical merits of such a scheme, "Rule 23, as written, does not support the district court's action." *Id.* at 1546. Rule 23 is far more balanced and precise, and it does not automatically bring within its ambit every multi-plaintiff case that may turn on an important central issue. The Rule recognizes a number of other interests in deciding whether a class is certifiable. Here, those interests would include the opportunity to litigate the central issue in a different forum, which might be more convenient for the victims, which might apply different and perhaps more favorable law, including in states such as Colorado the right to pre-judgment interest, and which would afford the victims an opportunity to have their own counsel who could emphasize a different theory of the case or focus on different evidence.

The courts below, however, took none of these interests into account. Contrary to what the court of appeals seems to suggest, nothing in Rule 23 gives self-designated class champions the right to decide for all those who are in a similar situation where and how their claims must be litigated, simply because a court believes that it would be more efficient to have the central question decided in one case for all time. This wholesale sacrifice of the interests of victims on the altar of efficiency is a sufficiently disturbing rationale alone to justify granting certiorari alone. *Cf. McDonnell Douglas, supra*, 523 F.2d at 1087 (Chambers, Wright & Kennedy, J.J., dissen-

ting from denial of rehearing *en banc* because class certification issues are of "tremendous importance").

The court's only effort to justify the absence of an opt out was its assertion that because the claimants could request a trial by jury under the Claims Resolution Facility, they have the functional equivalent of an opt out. That rationale, if accepted by other courts would undermine the protections afforded by Rule 23 and, on the facts of this case, it is an unsupportable version of what the district court did. Thus, in its memorandum granting class certification, the district court specifically stated that it "will not approve any opt-out provision" because that "would severely impede the interests of other class members as a practical matter." 153a, 154a. Moreover, the functional equivalent theory also overlooks the fact that petitioners and others who do not agree with the way in which this action was being handled will be barred from litigating the central issue of liability in another forum, with counsel of their own choosing. Therefore, even under the court's mistaken premise, petitioners have only been granted a partial opt out. Because no court has ever held that such a limited opt out satisfies Rule 23(b)(3), the court of appeals has created a major new interpretation of Rule 23 that further supports plenary consideration by this Court.

Furthermore, to satisfy the premise of equivalence, each victim must have the right to recover all of her damages. In this case, that would mean either that there would be no cap on the Claimants Trust or that Aetna would agree to guarantee the difference between the cap and the amount needed to compensate all victims in full. Aetna, of course, made no such pledge, and now that the reorganization plan and the *Breland* settlement have set a ceiling on the Claimants Trust, it is apparent that there is no right on the part of victims to look to Aetna for full compensation.

There is another problem caused by the method by which the Aetna contribution to the Claimants Trust will be distributed: the money will benefit all Dalkon Shield claimants proportionately. But as petitioners noted above, those with pre1975 claims have the weakest case against Aetna and the other coconspirators, and they

amount to approximately 50% of all claimants. Indeed, those claimants who were still wearing the Shield after 1978 may have an even a stronger claim because of the agreement entered into between Aetna and Robins at that time. Despite the fact that the purported common issue of liability may not be common to the entire class, all Dalkon Shield victims, regardless of when their injuries were sustained, or when they removed the device, will share in the Aetna contribution; that plainly would not happen if there were a real opportunity to opt out.

Finally, punitive damages are not allowed under the plan, and hence the court's argument that petitioners have the functional equivalent of an opt out overlooks that aspect of petitioners' claims as well. While petitioners do not question the elimination of punitive damages against a corporation like Robins, which is undergoing reorganization, the denial of the right to sue a solvent company like Aetna for punitive damages further undermines the assertion by the court of appeals that petitioners were given the functional equivalent of the right to opt out.

Accordingly, both because of the conflicts in the circuits and the importance of the decision below to the application of Rule 23 to mass tort cases, this Court should grant review.

B. The Denial of the Right To Opt Out Conflicts With *Phillips Petroleum* and Other Due Process Decisions of This Court

If the Court concludes that this case was properly certified as a non-opt out class under Rule 23(b)(1), it then must address the question whether, under *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985), the due process rights of these petitioners were violated. In *Phillips Petroleum* this Court stated in no uncertain terms that, in class actions principally involving claims for money damages:

> we hold that due process requires at a minimum that an absent plaintiff be provided with an opportunity to remove himself from the class by executing and returning an "opt out" or "request for exclusion" form to the Court.

Id. at 812. At one time, when certain petitioners were seeking to file their own actions against Aetna, the Fourth Circuit apparently agreed that *Phillips Petroleum* gave these petitioners a right to opt out, *see* p.8, *supra*, but it now appears to have abandoned that view in favor of a rule allowing courts to substitute what they consider to be a functional equivalent in place of an actual opt out. Or perhaps the court of appeals believes that the federal courts are not bound by the due process limitations imposed on state courts under *Phillips Petroleum*. But whatever its rationale, the court of appeals has plainly not followed the clear mandate in *Phillips Petroleum*.

The class certified here consists of a nationwide group of 195,000 or more victims. None of them ever had any direct contact with respondent Aetna concerning this matter. This suit was only transferred to Virginia because that is where the Robins bankruptcy was pending. Indeed, most of the victims had no connection with Virginia other than that was the place where their Dalkon Shield was manufactured. Moreover, they did not buy the Shield from Robins directly, but obtained it from their physician. The question is, can 195,000 women be required to litigate their claims against Aetna in Virginia or lose their rights entirely?[8]

Phillips Petroleum held that an opt out was constitutionally required for a nationwide damages class action brought in state court, and at least one court of appeals, *In Re Temple, supra*, 851 F.2d at 1272, and three district courts, *Waldron v. Raymark Industries*, 124 F.R.D. 235, 238 (N.D. Ga. 1989); *Avagliano v. Sumitomo Shoji America, Inc.*, 107 F.R.D. 748, 749-50 (S.D.N.Y. 1985); and *In Re Jackson Lockdown MCO Cases*, 107 F.R.D. 703, 713-14 (E.D. Mich. 1985), have concluded that the ruling applies fully to federal court litigation. *Accord*, Miller & Crump, *Jurisdiction And Choice Of Law In Multistate Class Actions After Phillips Petroleum Co. v. Shutts*, 96 Yale L.J. 1, 30-31 (1986);*School Asbestos Litigation, supra*,

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[8]The fact that the class was certified for settlement purposes is of no significance to the question whether petitioners have a constitutional right to opt out since they also objected to the settlement. While the settlement may make the case more manageable, it does not in any way obviate the due process objections raised here.

789 F.2d at 1002 (recognizing problems with personal jurisdiction and intrusion on states from non-opt out in federal court class action).

Moreover, only this past term in *Martin v. Wilks*, 109 S. Ct. 2180, 2183 (1989), this Court restated the "general rule that a person cannot be deprived of his legal rights in a proceeding to which he is not a party." Thereafter, quoting *Hansberry v. Lee*, 311 U.S. 32, 40 (1940), the Court described this rule as "a principle of general application of anglo-American jurisprudence. . . ." *Id.* at 2184. If due process required that the objecting parties in *Martin* be given their day in court, so here, petitioners must be given their opportunity to litigate their claim against Aetna and not be swept into a mandatory, nationwide class as part of a settlement to which they strenuously object.

Phillips Petroleum did not completely eliminate the mandatory class action in appropriate cases under Rule 23(b)(1), because this Court stated that its "holding today is limited to those class actions which seek to bind known plaintiffs concerning claims wholly or predominately for money judgments." 472 U.S. at 811 n.3. But *Phillips Petroleum* should have made it clear that the district court could not, consistent with the Due Process Clause, prevent petitioners from opting out of a lawsuit for money damages in which they had chosen not to participate. And the holding in *Phillips Petroleum* should also have made it clear that those thousands of Dalkon Shield victims who did not wish to take part in the *Breland* action could not be bound by settlement terms that were crafted by counsel that they did not choose and that were forced upon them in a forum where they did not wish to litigate.

In an effort to avoid the inevitable conclusion from *Phillips Petroleum* that the denial of the right to opt out in a damages case like this is unconstitutional, the court of appeals sought refuge in what it saw as the more "flexible" approach of *Mathews v. Eldridge*, 424 U.S. 319, 334 (1976), that it found was satisfied by what the court saw as a functional equivalent of an opt out (76a). *Mathews*, of course, did not involve any issues related to the power of a court

to deny persons their right to pursue independent claims for money damages outside the scope of a class action. Moreover, as we have previously demonstrated, petitioners were not given even the functional equivalent of an opt out. *See* pp. 19-20, *supra*. But even if the *Mathews* test were applied here, a nationwide non-opt out class is clearly impermissible because the individual's interest in her own adjudication of her own tort claim, in the jurisdiction of her choice, with her own counsel, far outweighs the societal interest in having a single, unified class determination. This is particularly so in the context of a mass tort case that does not involve a single disaster or catastrophic event, where there is no common issue of liability, and no single forum uniquely appropriate for resolving all of the claims. *See* Miller & Crump, *supra*, 96 Yale L.J. at 55-56.

Finally, the decision below is also inconsistent with the spirit and method of analysis in the recent decision of the Third Circuit in *In Re Real Estate Title & Settlements Services Antitrust Litigation*, 869 F.2d 760 (1989), *cert. pending sub nom. Chicago Land & Title Co. v. Tucson Unified School District*, No. 88-2050, filed June 15, 1989. There the court held that it violated due process for a federal court in Pennsylvania to enjoin Arizona plaintiffs from pursuing claims in the Arizona state courts, even though those plaintiffs had been members of a mandatory class certified under Rules 23(b)(1) and (b)(2), whose case in the Pennsylvania court had been settled with court approval, and those plaintiffs had unsuccessfully appealed the denial of a right to opt out of the settlement. While the cases are factually distinguishable, the Third Circuit was much more solicitous of the due process rights of absent class members than was the Fourth Circuit here, a difference that provides a further basis for review by this Court.

The clear failure of the court of appeals to abide by this Court's holding in *Phillips Petroleum*, and the impact that the decisions below may have on our basic shared assumptions about how the anglo-American system of jurisprudence is supposed to work, warrant this Court's plenary review.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

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